

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-3035

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

v.

HON. DAVID N. EDELSTEIN, CHIEF
JUDGE, UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK, and UNITED STATES
OF AMERICA,

Respondents.

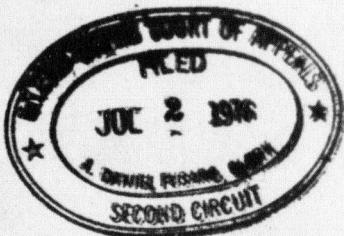
ON PETITION FOR EXTRAORDINARY WRIT
TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO
RESPONSE OF UNITED STATES OF AMERICA
TO PETITION FOR EXTRAORDINARY WRIT

BRUCE B. WILSON
Acting Assistant Attorney General
Antitrust Division

BARRY CROSSMAN,
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Attorneys,

Department of Justice,
Washington, D.C. 20530.



PAGINATION AS IN ORIGINAL COPY

I N D E X

- Exhibit A Transcript of the trial,
pp. 11133 - 11142.
- Exhibit B Letter dated July 14, 1972
from Raymond M. Carlson to
George B. Turner.
- Exhibit C Letter dated May 13, 1974
from Special Masters Climenko,
McLaughlin and Meyer to Charles
M. Waygood and James I. Serota.
- Exhibit D Letter dated May 17, 1974
from Job Taylor III to Special
Masters Climenko, McLaughlin
and Meyer.
- Exhibit E Letter dated May 20, 1974
from Special Master Bernard
S. Meyer to Job Taylor III
- Exhibit F Letter dated October 17, 1974
from Job Taylor III to James I.
Serota.
- Exhibit G Brief for the United States in
United States of America v.
Leggett & Platt, Inc.,
No. 75-1719 (6th Cir.)
- Exhibit H Reply Brief for the United States
in Leggett & Platt, Inc.
- Exhibit I Letter dated October 13, 1970 from
F.A.O. Schwarz, Jr. to Burton R.
Thorman.

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2 and tangential way, but, ultimately, if it does not involve
3 an issue dealing with garbage or its disposal, the fact that
4 it has been received may be of no worthwhile or useful
5 purpose.

6 THE WITNESS: Thank you.

7 (Defendant's Exhibit 689 received in evidence.)

8 THE COURT: I would also explain to you, since
9 you are interested and this is a trial and we try and hope
10 that witnesses will understand our procedure, that very
11 often in a nonjury case, a bench trial, as distinguished
12 from a jury trial, the Court exercises a latitude which it
13 is reluctant to allow in a jury trial, the fear being that
14 those who are uninitiated and not completely steeped in the
15 ways of a proceeding in the law may be unnecessarily
16 prejudiced. Their minds might be indoctrinated and, so,
17 we exercise restraints there that are not necessary in a
18 bench trial.

19 Further, in a case of long duration, where it is
20 impossible and inconceivable for the evidence to come in by
21 any one witness or by any one document, to be able to see all
22 the way down the road, for anybody, unless perhaps the good
23 Homer and even he, I understood, nodded occasionally, is an
24 absolute impossibility.

25 Thus, in a bench trial, the Court can allow a

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great many matters to come in and eventually find that they are irrelevant and they have no weight, they do not in any way help to establish the allegation, and the Court can so treat them.

Indeed, in a jury trial, very often even in a criminal jury trial, and I emphasize this, very often evidence is taken subject to connection, and this is particularly true where you have a conspiracy count, and then, of course, the Court will undertake, if he finds it necessary to strike any testimony, to attempt to purge the jury's mind of any evidence which might have prejudiced him.

Do you understand?

THE WITNESS: Yes, sir.

THE COURT: I think you are entitled to that.

THE WITNESS: Believe me, I am not impatient. I am willing to testify on this all day long. The question was in my mind.

MR. DODYK: Your Honor, I feel I should at this point make a statement so that your Honor understands my own position on this because I understand your Honor to have directed a criticism to the use --

THE COURT: I did.

MR. DODYK: (Continuing) -- of Defendant's Exhibit 689.

2 THE COURT: Before you answer, let me make my
3 criticism very pointed so you can meet it, if you wish.

4 My criticism is that it is not a relevant or
5 pertinent argument to indicate any past ruling as being a
6 predicate for any present ruling. That is not an argument.
7 It has nothing to do with the merits of any objection.

8 I am perfectly willing to hear any objection you
9 may have on any ground, but certainly past history has nothing
10 to do with any present ruling.

11 MR. DODYK: I appreciate the fact, your Honor,
12 that you make each of your rulings as you see fit --

13 THE COURT: And in the context of the question
14 and the answer and in the frame of reference.

15 MR. DODYK: Quite so, your Honor.

16 THE COURT: All right, now you may answer.

17 MR. DODYK: I think I should say at this point
18 that as the trial has progressed, plaintiff's counsel has
19 offered many, many documents for which we believe no proper
20 foundation has been laid and which have not been authenticated
21 in the sense in which we normally use that term.

22 Your Honor has seen fit to receive documents in
23 those circumstances and we seek to protect our client's
24 interest within the framework of the rules, your Honor, as
25 applying in the course of this case and we are and have been

2 led to make offers of documents, which, as in the case of
3 Defendant's Exhibit 689, to my mind very correctly points
4 out that the foundation established is not that which one
5 would normally seek to establish.

6 THE COURT: Mr. Dodyk, you see, it would have
7 been entirely more appropriate to deal with the document by
8 merely indicating that you think it should be received in
9 order to meet documents that have been received on the
10 plaintiff's side instead of going through the process of
11 asking this witness to identify the document and observing,
12 as indeed I think you should and must, that the witness
13 wasn't identifying the document at all.

14 I received this document and I must confess that
15 it is quite conceivable that when I look at the case I will
16 find that there is garbage on both sides, but if you think
17 that it is necessary to make offers that have absolutely no
18 foundation, if that is your true view, if you think that by
19 meeting those offers by giving this Court other documents,
20 which have no foundation, so be it, but your reply in
21 retort to my criticism I don't think meets the question
22 that I have raised head on or at all.

23 You haven't been denied the receipt of documents
24 and let's assume the worst possible instance of receiving
25 documents on the part of the plaintiff's side and refusing

1 to receive them on the part of the defendant's side. Merely
2 because you say that my ruling in receiving the plaintiff's
3 document was wrong because there was no foundation and that
4 your foundation is at least as good, if not better, is
5 certainly no argument.
6

7 That goes back to the old argument that I have
8 made. I have known lawyers who deliberately offer documents
9 in order to invite an adverse ruling and then count up and
10 say, "Oh, my heavens, this judge is prejudiced. Look how
11 many rulings he has made in favor of one side and look how
12 many rulings he has made in opposition to the other side."
13

14 I just don't think that is an argument at all.
15 Your documents have been received and when they have been
16 received I have received them because in my good judgment
17 I thought in view of the entire case they should be
18 received, not because of past history and it has nothing
19 to do with the rulings I have made in behalf of the plaintiff,
20 nothing whatsoever. Each ruling stands on its own.

21 Thus, when I have received your documents,
22 I received them because in the frame of reference, the
23 context of the witness' testimony and for the purpose of
24 the overall view of the case I thought they should be
25 admitted.

Do you understand that?

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2 MR. DODYK: Yes, I understand that, your Honor.
3 May I make one more statement?

4 THE COURT: Make as many as you like. We have
5 all the time in the world.

6 MR. DODYK: I shouldn't unduly burden the
7 record --

8 THE COURT: At this point I don't think that is
9 of any great moment.

10 MR. DODYK: Your Honor, the point that I do want
11 to make is that the documents which we have been dealing with
12 here are offered not to rebut any prior document which the
13 plaintiff may have offered without foundation in the past,
14 but to rebut Mr. McCollister's testimony to the effect that
15 no leasing company dealt with RCA computer equipment.

16 As your Honor has adopted the procedure of
17 allowing in evidence, receiving documents without the
18 traditional showing of foundation or authentication, it
19 seemed to us that these documents serving what we believe to
20 be that legitimate purpose in the context of cross-examination
21 should have been used for that purpose.

22 I am, of course, mindful of your Honor's
23 suggestion that perhaps in those circumstances we should
24 proceed without attempting an identification and --

25 THE COURT: No, no, that is not what I said.

2 That is not at all what I said. I am sorry to interrupt you.
3 I didn't say without an identification. I am merely saying
4 that this witness and others, perhaps, have not identified
5 the document at all. They merely read it. That is not an
6 identification.

7 MR. DODYK: Yes, your Honor.

8 THE COURT: I certainly don't accept your
9 statement of traditional showing of foundation not having
10 been required by the Court. Perhaps your definition and mine
11 may vary from time to time, but I think it is out of order
12 for you to indicate that I have waived the traditional showing
13 of foundation.

14 MR. DODYK: I had only meant --

15 THE COURT: I reject that.

16 MR. DODYK: I meant to say that I had understood
17 the Court to suggest that rather than by seeking an
18 identification of Defendant's Exhibit 689 for identification
19 that I should rather have simply offered it.

20 THE COURT: No, that is not what I meant.
21 I merely meant to say where the witness clearly indicates
22 that he has no way of identifying the document, then perhaps
23 the argument should be on an entirely different level.
24 Certainly not to clutter up the record with what appears to
25 be an identification by the witness when, indeed, there is no

2 identification whatsoever, that he is merely reading from
3 the face page or some other part of the document.

4 MR. GOLDBERG: If your Honor please, I would just
5 note on the record that Mr. Dodyk's summary of what he heard
6 the witness state is not my understanding of what the witness
7 has stated and I thought I should put on the record that my
8 silence in no way indicates agreement with Mr. Dodyk's
9 summary of the witness' testimony, which I believe to be
10 incorrect.

4 11 THE COURT: I would indicate further that it was
12 the Court's questions that brought out some of the testimony
13 about leasing companies, which the witness characterized
14 as inconsequential, and, in fact, testified that as to those,
15 other than Transamerica, that sales were made in one or two
16 cases involving single systems sold through a leasing
17 company. Is that what you said?

18 THE WITNESS: Yes, your Honor.

19 THE COURT: I am certainly interested in the
20 subject and the best evidence that we can obtain on this
21 point would be helpful.

22 MR. DODYK: Thank you, your Honor.

23 BY MR. DODYK:

24 Q Mr. McCollister, do you know how many computer --

25 THE COURT: Just one more point. I want you

2 both to keep this clearly in mind: I am not running any
3 tally sheet and my rulings are not based on a one to one
4 basis. I want you to keep that very clearly in mind and I
5 emphasize that.

6 I am not going to get into that kind of a swivet.
7 It is the oldest ploy I know.

8 Each ruling is made based upon my understanding
9 of the problem, my view of the law as it applies on the
10 overall picture. I have no desire, no interest, no
11 concern in trying to keep an even balance, one for the
12 Government, one for IBM, one for IBM, and another one for
13 the Government.

14 Now, I want to disabuse you of that notion.
15 Each ruling is as sound as I can make it at this time.

16 MR. DODYK: Your Honor, I would state for the
17 record that we have always understood that to be the case
18 and if anything that I have said has given your Honor a
19 contrary indication, I would repudiate that.

20 THE COURT: Certainly I would think that you
21 would be very uneasy if you thought that we were merely
22 balancing the rulings one as against one rather than you
23 having the notion that when a ruling is made in your favor
24 that it is based on the argument and the problems and in
25 the frame of reference in which any document or piece of

2 testimony is offered. Isn't that so?

3 MR. DODYK: I have no question about that, your
4 Honor. I am eager that your Honor understand that.

5 THE COURT: All right.

6 BY MR. DODYK:

7 Q Mr. McCollister, do you know if the Analytical
8 Computer Service, Inc. organization, which is referred to
9 in Defendant's Exhibit 689, acquired any other RCA computer
10 equipment other than that indicated in that exhibit?

11 A Mr. Dodyk, I have no knowledge of the Analytical
12 Computer Services Company nor of any transactions in which
13 they might have been involved.

14 Q Directing your attention next to Defendant's
15 Exhibit 690, do you know whether the Marketime Corporation
16 acquired any RCA computer equipment other than that referenced
17 in that exhibit?

18 A I do not and I think there is even a possibility
19 that the situation mentioned in this exhibit did not
20 completely materialize.

21 MR. DODYK: Your Honor, may I move to strike the
22 portion of the answer which relates to the possibility of
23 the transaction having been referred to not materializing?
24 I have been quite patient, I believe, in the witness going
25 nonresponsive, but it seems to me it is getting out of hand.

Exhibit B

Files

Corres. Unit

Carlson

Widmar

Serota

Thorman

TEK:BRT:RMC

60-235-38

JISerota/RMCarlson:bem

July 14, 1972

IBM Staff
Hold

George B. Turner, Esquire
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

Re: United States v. International Business
Machines Corporation, 69 Civ. 200, S.D.N.Y.

Dear Mr. Turner:

From our preliminary review of the lists of the thousands of documents for which IBM claims privilege forwarded to us on March 15, 1972, and because of assertions of privilege advanced by counsel for IBM in the course of various depositions, it is our view that a conference of counsel on the subject of IBM's privilege claims is in order. The purpose of the conference would be to isolate, discuss and attempt to deal with problems of procedure for resolving these claims at the earliest possible time.

One fruitful approach may be to seek agreement, insofar as possible, delimiting some or all of the various categories of IBM's alleged privilege claims. With this approach, a possible end in mind would be the elimination from further dispute of certain categories of claims where we can agree that the existence or absence of privilege can be admitted. By this technique we may be able to reduce substantially the volume of documents that the master(s) and the Court will have to consider. Some tentative categories listed for discussion are furnished herewith in Attachment A. It is expected that, within these and perhaps other categories, some particular standards or criteria can be adopted by agreement, which will enable us to zero in on the factual or legal questions which are crucial to the ultimate decision.

M. E. P. J.

In one particular area, it may be helpful to consider a joint proceeding in this and the Control Data case, perhaps by the appointment of a special master selected by both Courts and employed on an expense sharing basis. Thus, in a number of depositions, including those of Hilary A. Faw and Otis S. Page, it has become clear that some broad and sweeping claims of privilege are being made by IBM with respect to writings, tasks and performances of persons who have been at one time or another associated with an IBM organizational segment known as office of the Director of Business Practices. Questions of privilege with respect to particular documents assertedly generated under the protective umbrella of this office have been raised in various depositions. As a matter of fact, Messrs. Waygood, Berens and I have already had a cursory discussion about the need for an early resolution of this area of asserted privilege to avoid the eventuality of having to reconvene many depositions.

We have also done some initial checking on the allegedly privileged materials found among the exhibits to various depositions. For undisclosed reasons, we are finding documents missing where only parts of the document are claimed to be privileged. This may have occurred because of your decision to take care of the excising yourself, rather than have Mr. Anderson's reporting firm handle it. In any event, we would appreciate receiving the missing documents promptly.

Sincerely yours,

THOMAS E. RAUPER
Assistant Attorney General
Antitrust Division

By: Raymond M. Carlson
Attorney
Department of Justice

Attachment A

I

Internally Generated Documents

- (1) Vicarious communications with persons outside IBM who are not lawyers employed by IBM. For example:

Files of 30-613, 9/17/68, page AA0001155, J. S. Birkenstock to Joan Van Horn, Attached Letter; Reason Withheld: Settlement negotiations (A5);

Files of Dept. 31-630, 4/29/66, page AA0001338, E. R. Fiore to Hon. Anthony J. Travia, Attached Letter; Reason Withheld: Status Report of legal activity (B9);

Files of T. V. Learson, 12/10/64, page AA0001068, A. L. Williams to Emmanuel Celler, attached letter, cc: Sherman M. Fairchild, William H. Moore, T. J. Watson, Jr.; Reason Withheld: Furnishing legal advice (B6);

Files of G. B. Beitzel, 7/8/69, page AA0000160, J. W. Knight to Department of Justice, Attached Letter; cc: B. Butler; Reason Withheld: Status Report of legal activity (B9).

- (2) So-called legal advice by an IBM (non-lawyer) employee to a wide distribution list (e.g., Files of 12-740, page AA0001437, 7/18/68, F. G. Rogers to Branch Managers, cc: SLEM managers; Reason Withheld: Furnishing legal advice (B6)).

- (3) Minutes of official corporate meetings. For example:

Minutes of Management Review Committee Meeting, 4/17/68 (Roll B70B), present: T. J. Watson, Jr., T. V. Learson, A. K. Watson and A. L. Williams;

Management Committee Minutes, 10/17/69 (Roll B70B), present: W. C. Hume, G. E. Jones and B. Marshall;

604 Status Report as of Tuesday Morning, June 30,
1964, C-3395.

(4) Notes, memoranda or other materials produced from the files of a non-lawyer, where no author is shown (e.g., Files of W. C. Hume, 8/21/64, page AA0002991, no author, addressee or person copied, Buckalip; Reason Withheld: Reflects or discusses legal advice (B8)).

(5) Communications produced from the files of a non-lawyer, where such person is not named as author, addressee or recipient of a copy (e.g., Files of D. M. Sturges, 6/13/67, page AA0000625, W. C. Doud to R. E. Williams, memo, cc: W. R. Brown, F. Chadurjian, T. E. Climis, D. J. Cunningham, Sam Jennings, F. A. Marks, L. E. Reeder, R. I. Townsend; Reason Withheld: Reflects or discusses legal advice (B8)).

(6) Communications withheld on ground of "Requesting Legal Advice," where the addressee is not a lawyer (e.g., Files of Hume, 9/24/70, page AA0002820, D. R. McKay to W. C. Doud, Memorandum, cc: R. H. Bullen, R. W. Hubner, W. C. Hume, G. E. Jones; Reason Withheld: Requesting legal advice (B7)).

(7) File memoranda by a lawyer produced from the files of a non-lawyer (e.g., Files of Sturges, 5/15/68, page AA0000567, L. B. Ungar to Files, Memorandum, cc: W. R. Brown, J. W. S. Davis, Jr., H. B. Farr, Jr., D. T. Kearns, L. W. McKinney, C. B. Laughlin, T. Robertson, T. M. Spain, D. W. Sweeney, T. M. Scogin; Reason Withheld: Legal investigation report/memo (B10)).

II

Externally Generated Documents

(1) Vicarious communications with persons outside IBM.
For example:

Files of 12-740, 6/1/67, page AA0001623, Harry N. Burgess to George B. Turner, Attached Letter;
Reason Withheld: Furnishing legal advice (B6);

Files of G. B. Beitzel, 4/21/70, page AA0000096,
G. B. Turner to J. L. Wilson, att. letter, cc:
H. N. Burgess, Katzenbach, McLaughlin, Evangelista;
Reason withheld: Status Report of legal activity (B9).

(2) Communications produced from the files of a non-lawyer, where such person is not named as author, addressee or recipient of a copy (e.g., Files of T. V. Learson, 7/9/68, page AA0001063, Newmyer Assoc. to Dean R. McKay, attachment to memo, cc: Krieg, Farr, Frey, McLaughlin, Russell, Pedicord, Weil; Reason Withheld: Furnishing legal advice (B6)).

(3) Communications from a lawyer furnishing legal advice produced from the files of the addressee (e.g., Files of T. V. Learson, 3/1/65, page AA0001062, George B. Turner to T. V. Learson, letter; Reason Withheld: Furnishing legal advice (B6)).

(4) Communications from a lawyer furnishing legal advice produced from the files of a person who is not the addressee (e.g., Files of Faw, Oct. 3, 1968, page AA0002751, George B. Turner to Burke Marshall, Letter, cc: C. B. McLaughlin, Jr.; Reasons Withheld: Furnishing legal advice (B6); Status Report of legal activity (B9)).

Fink, Weinberger, Meyer & Charnick, P.C.

Attorneys at Law

845 Fifth Avenue

New York, N.Y. 10017

DEPT. OF JUSTICE MAIL ROOM 682-0546

ORON

May 17 11 47 AM '74

DEPT. OF JUSTICE
MAIL ROOM
ORON

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Exhibit C

May 13, 1974

IRVING H. MEYER
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CHARLES J. MOOS
DAVID L. G. FIDMAN
ARTHUR C. FINK
DAVID R. BERMAN
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JAMES J. HARRINGTON
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DANIEL HIRSCH
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PATRICK A. LYONS
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H. THEODORE HUSTIS, JR.
CHARLES M. NEWMAN

Chief Judge David N. Edelstein
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: United States v. International
Business Machines Corporation

Dear Chief Judge Edelstein:

The Special Masters met with counsel for the Government and counsel for IBM on Friday, May 10th, as requested by the Court, in an effort to devise means of expediting the work of the Special Masters. The following conclusions were reached at the conference.

1. Pending the decision of the Government's objections as to the Final Report of Special Masters After Evidentiary Hearings of October 24 and 26, 1973, the Masters will review documents which will not be affected by the conclusions reached on those objections. In order to do this, the attorneys for the parties will prepare a list of documents by sources, graded according to how few of the documents included in the group would be affected by the rulings on the objections. The attorneys will furnish such a list to the Special Masters as quickly as possible and the documents will then be furnished to the Special Master to whom the particular documents are assigned. The Masters will read documents in accordance with the priority established by that list

60-235-38
DEPT. OF JUSTICE

27 MAY 17 1974

Chief Judge David N. Edelstein

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May 13, 1974

until such time as the rulings on the Government's objections have been made. The Special Masters will then go back to reading documents in accordance with the original priorities established by the Government's lists.

2. The Government will advise not later than May 31st of its fourth and final category of priorities with respect to the remaining 70,000 documents. The only exception to the May 31st cut-off date is that, with respect to documents for which partial privilege has been claimed, the Government may on May 31st state that it wishes an extension of time, indicating how much additional time will be required.

3. With respect to Special Master Order No. 13, the Government inquired when the categorization required by that order would be completed. IBM replied that the work was in process but would require at least an additional 60 days to complete. It was, however, agreed that the completion of the categorization would depend in part on the additional priority assigned by the Government and that IBM would furnish to the Government a more specific estimate of date of completion as soon as it has received the Government's Priority 4 listing.

4. Without prejudice to the Government's position that additional evidentiary material cannot be offered by IBM with respect to the documents listed in Special Master Order No. 6, it was agreed that the facts stipulated to by the Government and IBM with respect to the documents listed in Special Master Order No. 11 can be considered by the Special Masters in passing upon documents listed in Special Master Order No. 6.

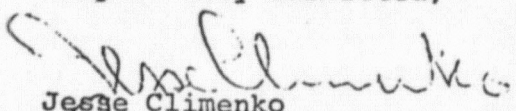
5. The Special Masters requested that IBM and the Government furnish to the Special Masters an agreed statement of the procedure to be followed by the Special Masters in passing upon the various documents presented to them, the point being that so many codes, lists, priorities and memoranda have now been furnished to the Special Masters that it would be very easy for them to go astray in passing upon documents. It was agreed that

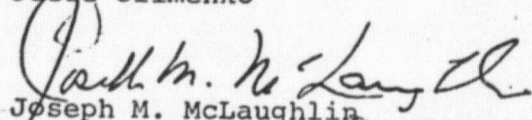
May 13, 1974

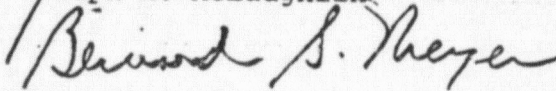
three things would be furnished to the Special Masters: first, a listing of the reference documents to be used by the Masters in passing on questions of privilege, second, a statement of the steps to be followed by the Special Masters in so doing, the statement to be agreed upon by counsel for both sides if possible; third, if the parties cannot agree upon a statement of steps to be taken, then a statement of the differences between the parties in such form that the Special Masters will be able to pass upon the differences without requiring a meeting or oral argument. The three items are to be presented to the Special Masters by Friday, May 17, 1974.

6. The Special Masters and the attorneys agreed that while they would be available for any meetings that the Court desired, a meeting with the Court is not required at this time and the scheduling by the Court of a further pre-trial conference need not be delayed for that purpose.

Respectfully submitted,


Jesse Climenko


Joseph M. McLaughlin


Bernard S. Meyer

Special Masters

cc: Raymond M. Carlson, Esq.
Charles M. Waygood, Esq.

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

299 PARK AVENUE, NEW YORK, N.Y. 10017

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L. RENE HOLLTER
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CHARLES C. DONOHUE, JR.
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THOMAS G. DRAPER, JR.
TOGER R. HISSAM
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THOMAS C. O'BRIEN
JEFFREY S. DUNAY

3706 *McLaughlin*
McCluskey
McCluskey
Serota
Files

RICHARD E. OLWINE
1913 1954

JOHN E. CONNELLY, JR.
EDWARD F. JOHNSON
COUNSEL

EMILE ADRESS, OLCONE

TWO OCEAN HTS
FID 881 8170

Exhibit D

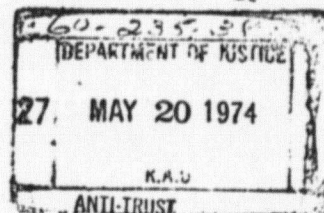
May 17, 1974

U.S. v. IBM
Special Master Proceedings

Dear Special Masters Climenko, McLaughlin and Meyer:

Pursuant to your instructions of Friday, May 10, 1974 and as stated in your report to the Court dated May 13, 1974, I met with Mr. Serota on Tuesday, May 14, to work out the proposed statement of procedures and reference lists outlined in paragraph 5 of your May 13 letter to the Court. Mr. Serota and I are in agreement on the proposed procedures and reference lists that are enclosed.

I will send a messenger to Judge Meyer's office and Dean McLaughlin's office to retrieve the Categorization Report submitted on December 21, 1973 in order to accomplish the task suggested by the parties as indicated in footnote 2 on page 1 and footnote 1 on page 2 of the enclosed report. The Masters do not have the January 15, 1974 Categorization Report in their possession because when the report was originally forwarded to the plaintiff and the Court, Special Master Order No. 11 had not been issued. I anticipate being able to return the integrated Categorization Reports covering the documents assigned by both Special Master Orders No. 6 and 11 by the latter part of next week. The purpose of the parties work on those reports will be to reduce into one usable report the information that is now covered by several Categorization Reports and is explained in detail in the enclosed procedures.

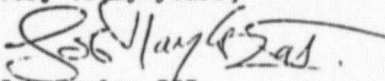


0/74

I am in receipt of Mr. Serota's letter of May 16 as well as Judge Meyer's letter of the same date concerning the sequence of review. It is our position based upon the meeting of May 10 and the Masters letter to the Court of May 13 that the Masters would commence reviewing files with the smallest percentage of Task Force and Business Practices documents and work up to the files that contain large percentages of those documents. It was also our understanding that the Masters would resume reviewing documents based on the plaintiff's original priorities upon receiving a determination or resolution of the plaintiff's appeal of the Masters' Final Report concerning the Office of Business Practices and the Task Forces. I am enclosing a suggested order of review so that file sources having zero percentage of Task Forces and Office of Business Practices assigned by Special Master Orders No. 6 and 11 would be read first, building up by percentage.

IBM will provide the Masters with whichever files from Special Master Orders No. 6 and 11 in whatever order the Masters desire to receive them.

Very truly yours,


Job Taylor III

Jesse Climenko, Esq.,
Messrs. Shea Gould Climenko & Kramer,
330 Madison Avenue,
New York, N.Y. 10017.

Dean Joseph M. McLaughlin,
Fordham University Law School,
140 West 62nd Street,
New York, N.Y. 10023.

Judge Bernard S. Meyer,
Messrs. Fink, Weinberger,
Levin & Charney,
551 Fifth Avenue,
New York, N.Y. 10017

bac
Enclosures

Copy for: Raymond M. Carlson, Esq.
(By Air Mail)

MASTER McLAUGHLIN

<u>File Source</u>	<u>Assigned by Special • Master Order No.</u>	<u>Percentage of Task Force and Business Practices Documents</u>
1. Armonk Mkt. Analysis	11	0%
2. Commercial Analysis ER	11	0%
3. Corp. Mkt. Analysis	11	0%
4. Dept. 30-671	11	0%
5. Dept. 30-727	11	0%
6. Dept. 30-733	11	0%
7. Dept. 30-735	11	0%
8. Hubner	11	0%
9. Misc. Joint Plan	11	0%
10. Poughkeepsie Mkt. Analysis	11	0%
11. Bullen	6	2%
12. T. J. Watson	6	2%
13. Johnson	11	6%
14. Dept. 30-613	6	7%
15. A. K. Watson	6	8%
16. Dept. 30-635	6	14%
17. Hume Warren	6	18%
18. Opel John	6	18%
19. Dept. 30-660	11	19%
20. Harrison Mkt. Evaluation	11	22%

MASTER McLAUGHLIN

21. D. P. Mkt. Evaluation	11	23%
22. Papes	11	24%
23. Piccone	6	28%
24. Dept. 12-701	6	33%
25. Dept. 30-726	11	50%
26. Commercial Analysis, WP	11	62%
27. Simmons	11	66%
28. Faw	6	100%

MASTER CLIMENKO

<u>File Source</u>	<u>Assigned by Special Master Order No.</u>	<u>Percentage of Task Force and Business Practices Documents</u>
1. Department 10-626	11	0%
2. Department 12-722	11	0%
3. Department 19-630	11	0%
4. Department 30-642	11	0%
5. Department 30-666	11	0%
6. Department 30-676	11	0%
7. Department 30-705	11	0%
8. Gibson	11	0%
9. Fiore	11	0%
10. Scott O.M.	11	0%
11. Department 18-630	11	.8%
12. Maurer	11	1%
13. Department 12-645	11	2%
14. Department 31-630	11	3%
15. DeSio	11	3%
16. Smith M.B.	11	3%
17. Williams A.L.	11	4%
18. Finley	11	4%
19. Jayne	11	4%
20. Branscomb	11	10%

MASTER CLIMENKO

21. Evans	11	12%
22. McKay	11	14%
23. McCarter	11	16%
24. Knaplund	11	17%
25. Sibley/Davis	11	22%
26. Powers	11	22%
27. Rizzo	11	29%
28. Ten Dyke	11	32%
29. Barrant	11	56%
30. Ten Dyke & Jayne	11	100%

MASTER MEYER

<u>File Source</u>	<u>Assigned by Special Master Order No.</u>	<u>Percentage of Task Force and Business Practices Documents</u>
1. Dept. 12-740	6	0%
2. Cary F.T.	6	2%
3. McElroy	11	2%
4. Pfeiffer	6	3%
5. Rodgers F.G.	6	4%
6. Learson T.V.	6	5%
7. Beitzel	6	7%
8. Jones G.E.	6	12%
9. McDermott	6	57%
10. Forese	6	80%
11. Sturges	11	80%

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
INTERNATIONAL BUSINESS)
MACHINES CORPORATION,)
)
Defendant.)

69 Civ. 200
(DNE)

SUGGESTED ROAD MAP FOR DECISION ON ISSUES OF
PRIVILEGE FOR USE OF SPECIAL MASTERS

1. Locate the document on the appropriate Categorization.
[All documents assigned by Special Master Order No. 6 will be found in Categorization of December 21, 1973; all documents assigned by Special Master Order No. 11 will be found in Categorization of January 15, 1974] (Items 5 and 6) */
2. Ascertain by reference to the Categorization listing whether a lawyer was involved as author, intended recipient or copyee.
3. Ascertain by reference to the Categorization listing whether the document is alleged to be covered by the facts found with respect to the CS&M Task Forces and the IBM Office of Business Practices. **/

*/ When there is a reference to ("Item") followed by a number the Item number refers to reference material listed infra.

**/ IBM will pick up the Categorization Reports submitted to the Masters on December 21, 1973 (Item 5) and January 15, 1974 (Item 6) and integrate the Task Force and Business Practices listings (Items 13, 14 and 15) for the documents covered by Special Master Orders No. 6 and 11. The parties will indicate the documents which IBM claims relate to the Task Forces by writing in blue ink on the report TF and the documents that IBM claims relate to the Office of Business Practices by writing in red ink on the report BP. It will then be unnecessary for the Masters to refer to (Items 13, 14 and 15).

4. Ascertain by reference to the Offers of Proof of February 28, 1974 whether the document is alleged to be covered by the facts set forth in the Stipulation re Offers of Proof dated March 14, 1974. Note that the Stipulation does not embrace all paragraphs of the Offers of Proof. Location of the document under a particular Appendix will supply the reference needed to locate the specific facts applicable. The key is as follows:

Stipulation A refers to Attachment A documents;
Stipulation B refers to Attachment B and C documents;
Stipulation D refers to Attachment E documents;
Stipulation E refers to Attachment F documents.

(Items 9 and 10) */

5. If no extraneous facts apply (i.e., the document is not alleged to fall within the evidentiary hearing set of facts or the Stipulation's set of facts (numbers 3 and 4 above) the document is ready for examination in the light of the privilege claimed. The nature of the privilege claimed (A/C or WP) is generally stated in the Categorization listings (described in number 1 above). If the decision on a particular document requires that the more specific area of privilege claim be known, that reference appears at the line entry for the document as it appears in the original privilege listings. (Item 11; the code is explained by Item 12).

*/ The parties will integrate the information covered by the Stipulated Facts (Item 10) on the Categorization report referenced in Number 1 above by indicating which documents are alleged to be related to which stipulated facts by writing in green ink on the report Stip A Att. A etc. It will then be unnecessary for the Masters to refer to (Items 9 and 10) for document numbers.

6. If a reference to CS&M Task Force or Office of Business Practices is found in the Categorization, the facts applicable to that reference are contained in the Final Report of Special Masters after Evidentiary Hearings of October 24 and 26, 1973 (Item 8). If a reference to the Stipulation is located, the facts applicable to that reference are found in the indicated portion of the Stipulation, using the key set forth in 4 above (Item 10).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
INTERNATIONAL BUSINESS)
MACHINES CORPORATION,)
)
Defendant.)

69 Civ. 200

(DNE)

REFERENCES TO DOCUMENTS TO BE USED WITH THE
SUGGESTED ROAD MAP FOR DECISION ON ISSUES
OF PRIVILEGE FOR USE OF SPECIAL MASTERS

I. Lists of allegedly privileged documents:

Item No.

1. Priority 1 list - contained on Special Master Order No. 6;
2. Priority 2 list - contained on Special Master Order No. 11;
3. Priority 3 list - not yet assigned by the Court;
4. Priority 4 list - to be submitted by plaintiff on or before May 31, 1974.

II. Defendant's categories of listed documents - these identify by discrete group the following: (1) documents authored by a lawyer; (2) documents addressed to a lawyer; (3) documents on which a lawyer is copied; and (4) documents where none of these is present:

5. Categorization of December 21 - submitted on December 21, 1973, and applies to Priority 1 list;
6. Categorization of January 15 - submitted on January 15, 1974, and applies to Priority 2 list;
7. List of IBM Counsel dated August 3, 1973.

III. Facts extraneous to the documents:

8. Final Report of Special Masters after Evidentiary Hearings of October 24 and-26, 1973;
9. List containing Offers of Proof dated February 28, 1974;
10. Stipulation re Offers of Proof dated March 14, 1974.

IV. Other reference lists:

11. IBM Privilege lists submitted on July 30, 1973 for documents covered by Special Master Order No. 6, and January 28, 1974 for documents covered by Special Master Order No. 11;
12. IBM Privilege Code dated August 1, 1974;
13. CS&M Task Force and Office of Business Practices Lists of January 4, 1974 covering documents assigned by Special Master Order No. 6; */
14. Supplemental CS&M Task Force and Office of Business Practices Lists of January 16, 1974 covering documents assigned by Special Master Order No. 6; */
15. CS&M Task Force and Office of Business Practices Lists of February 13, 1974 covering documents assigned by Special Master Order No. 11. */

V. Legal references:

16. Plaintiff's Prehearing Memorandum on the Qualified Immunity from Discovery Accorded Trial Preparation Materials, dated June 14, 1973;
17. Plaintiff's Prehearing Memorandum on the Application of the Attorney-Client Privilege in the Corporate Context, dated July 20, 1973;

*/ These three lists contain the information set forth in the Categorization listings with respect to the documents alleged by IBM to be covered by the facts elicited as the result of the October 1973 Evidentiary Hearings.

18. Defendant's Memorandum re the Attorney Work Product Doctrine, submitted July 20, 1973.
19. Defendant's Memorandum re the General Applicability of the Attorney-Client Privilege, dated July 30, 1973.

Fink, Weinberger, Meyer & Charney, p.c.

Attorneys at Law

551 Fifth Avenue
New York, N. Y. 10017
(212) 682-0546

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WOLFE H. CHARNY
STUART D. LYON
STUART TROY
JAY W. WERTHEIMER

JAMES J. HARRINGTON
MONTON M. COHEN
HARRIS A. DAHER
DAVID M. GOLDBERG
DANIEL P. LUND
BRIAN MICHAEL SELTZER
DANIEL HIRSCH
JOEL C. BENDER
PATRICK A. LYONS
ROBERT E. HOWARD
STEPHEN P. SELIGMAN
MORDECAI D. BRAUNSTEIN
JOHN P. SELIGMAN
JEFFREY G. STARK
H. THEODORE HUSTIS, JR.
CHARLES M. NEWMAN

Exhibit E

May 20, 1974

Job Taylor III, Esq.
Olwine, Connelly, Chase, O'Donnell
& Weyher
299 Park Avenue
New York, New York 10017

Dear Mr. Taylor:

I return, as requested in your May 17th letter, my copy of Mr. Waygood's letter of December 21, 1973 to Chief Judge Edelstein together with the lists which accompanied it. Please return the letter when returning the marked lists.

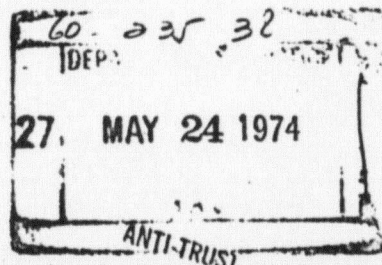
Out of an excess of caution I note that a cursory review of my IBM files shows that I have a letter from you dated January 28, 1974 addressed to the Masters and enclosing IBM privilege lists covering documents assigned by SMO 11, and a letter of February 5, 1974 enclosing Defendant's Memorandum Explaining the Various Categorizations, etc., neither of which is referred to in your May 17th letter or its enclosures. I assume that we may ignore these materials as well as any others not referred to in the "Roadmap," and will do so unless you or Mr. Serota contend otherwise.

Sincerely,

Bernard S. Meyer
Bernard S. Meyer

BSM:js
Enclosure

cc: Hon. David N. Edelstein
Jesse Climenko, Esq.
Dean Joseph M. McLaughlin
James I. Serota, Esq.



Mr. Carlson
Mr. Hinton
May 24 11 34 AM '74
ARTHUR A. LEVIN
COUNSEL
DEPT. OF JUSTICE
MAIL ROOM
WESTCHESTER OFFICE
300 MARTINE AVENUE
WHITE PLAINS, N. Y. 10601
(914) 428-0880

134/74

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

299 PARK AVENUE, NEW YORK, N.Y. 10017

212 688-0400

UL J. CHASE
MR. LOGAN O'DONNELL
MARY F. WEYHER
O. P. ARNABOLDI, JR.
J. F. BENDERICKER
WEST H. LORCH
CHARLES M. WAYGOOD

JAMES E. TOLAN
ROGER MULVILL
WIRT P. MARKS, III
JOHN F. WALSH, JR.
LEONARD J. CONNOLLY
EDWARD A. FROGMAN
CHARLES M. MCCAGNEY

ALEXANDER O'DONNELL
CHARLES A. BONNER
ALGER H. BECKE
STEPHEN SHEILS
NE GILLESPIE
BENE HOLLYER
CHAS. A. FEINSTEIN
CHARLES D. DONOHUE, JR.
EDITH S. KAYE
IGNAS G. DRAPER, JR.
JGER H. KISSAN
BERT B. ROSS
ONARL P. MORAN
BERT W. BOYD, JR.
ARIJO H. MURPHY
STEPHEN A. HASIDA

BARBARA E. BOETTCHER
JONATHAN C. LAKE
JOSEPH M. BURKE
JOB TAYLOR III
RICHARD D. BELFORD
JOSEPH C. KAPLAN
BRUCE E. FINDER
JEFFREY E. SILVER
JOHN A. RAYLL, JR.
GEORGE J. GROTHNER, JR.
THOMAS C. O'BRIEN
JEFFREY S. GUNAT
PETER ARON
STEPHEN SCHLESSINGER
LEO G. RAILAS
JOHN C. TIMM

RICHARD E. OLWINE
1913-1984

JOHN E. CONNELLY, JR.
EDWARD F. JOHNSON
COUNSEL

CABLE ADDRESS: OLWINE

TWA ROOM N14
RFD 881 8170

October 17, 1974

Exhibit F

U.S. v. IBM
Special Master Proceedings

Dear Mr. Serota:

I am forwarding to you under separate cover a copy of all of the documents listed in Attachment A of this letter.

This shipment consists of documents which IBM has been ordered to turn over to the plaintiff under the Final Report of the Special Masters dated July 24, 1974 and the Opinion of Chief Judge Edelstein dated October 5, 1974. The shipment covers the documents challenged by Plaintiff's Initial Memorandum On Priorities dated May 25, 1973 and assigned under Special Master Order No. 6 dated August 1, 1973.

As Mr. Waygood advised you by telephone today, there are some documents from a minor number of the file sources referenced in Special Master Order No. 6 which are still in process. I hope to be able to forward those to you in the very near future. We are also, of course, working on the balance of the documents covered by the Court's and Special Masters' Orders.

Very truly yours,

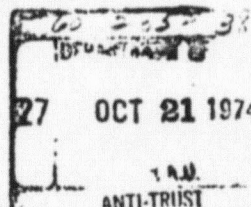
Job Taylor III

Job Taylor III

James I. Serota, Esq.,
Antitrust Division,
Department of Justice,
Washington, D. C. 20530.

arw

Copies for Messrs. Climenko, McLaughlin and Meyer



130/74

FILES OF: FORESE

AA 446 1	AA 458 2	AA 467 3
AA 448 2	AA 458 4	AA 467 4
AA 448 3	AA 458 5	AA 467 5
AA 448 5	AA 458 7	AA 467 6
AA 448 6	AA 458 8	AA 467 7
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AA 449 2	AA 458 11	AA 467 10
AA 449 3	AA 458 12	AA 467 11
AA 450 1	AA 459 1	AA 467 12
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AA 450 4	AA 459 5	AA 468 0-B
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AA 451 4	AA 460 2	AA 468 5
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FILES OF: FORESE

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AA 484 0-A	AA 499 3	

FILES OF: BULLEN

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FILES OF: COMMERCIAL ANAL WP

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FILES OF: LEANSON

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AA 1072	5	AA 2632	3	AA 2656	7
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AA 1073	8	AA 2633	2	AA 2658	2
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AA 1075	1	AA 2634	1	AA 2658	11
AA 1075	2	AA 2634	3	AA 2659	1
AA 1075	3	AA 2634	4	AA 2659	2
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AA 1082	6	AA 2640	7		

FILES OF: CARY

AA 2860	1
AA 2860	4
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AA 2860	7
AA 2861	1
AA 2861	2
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AA 2863	5
AA 2865	1
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AA 2866	1
AA 2866	6
AA 2866	7
AA 2867	1
AA 2867	2
AA 2867	3
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AA 2870	7
AA 2871	3
AA 2873	6
AA 2873	7

FILES OF: WATSON, TJ

AA 1089	1	AA 1148	9
AA 1089	5	AA 1154	8
AA 1089	9	AA 2576	1
AA 1090	2	AA 2576	6
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AA 1091	3	AA 2579	3
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AA 1091	10	AA 2586	1
AA 1093	2	AA 2586	2
AA 1098	7	AA 2590	1
AA 1105	7	AA 2595	4
AA 1108	10	AA 2597	7
AA 1109	7	AA 2599	1
AA 1110	2	AA 2599	2
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AA 1117	5	AA 2603	5
AA 1118	1	AA 2606	4
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AA 1123	6	AA 2610	12
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FILES OF: OPEL

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AA 1902	6	AA 2939	9
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FILES OF: JONES

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AA 2006	9
AA 2008	11
AA 2008	13
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FILES OF: PFEIYPEN

AA 2119	7	AA 2154	4	AA 2173	10
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AA 2121	5	AA 2154	8	AA 2174	8
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AA 2131	5	AA 2157	9	AA 2180	4
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AA 2154	2	AA 2170	4	AA 3098	5
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AA 3142	8
AA 3143	6
AA 3145	3

FILES OF: WATSON, AK

AA 1458	4
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AA 1460	1
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AA 1461	7
AA 1463	4
AA 1463	6
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AA 1486	1
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AA 1492	7
AA 1492	9
AA 1493	9
AA 3026	3
AA 3026	4
AA 3027	6
AA 3029	7
AA 3030	5
AA 3032	3
AA 3032	8

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October 13, 1970

United States v. International Business Machines Corporation, 69 Civil 200

RWMcL:LB
60-235-38

Dear Mr. Thorman:

I have your letter of October 2, 1970, attaching a request for the production of certain documents within 30 days. Fortunately, as you probably know, we are commencing to produce most of the documents covered by your demand on October 19 to Control Data Corporation ("CDC") in connection with the action pending in St. Paul. We shall, therefore, be happy to make those documents available to you as well at the same times and places. I should note that we are required under the order of Judge Neville to make those documents available to CDC in approximately equal bi-weekly instalments commencing on October 19 and concluding the final instalment no later than January 15, 1971. CDC is required to review those documents as they are produced and to complete that review no later than February 15, 1971. We would expect you to conform to the same schedule since I am sure you realize that it is very expensive and extraordinarily inconvenient to produce the huge mass of documents requested by you and by CDC (a preliminary estimate of the documents requested by you is that they are in excess of 10 million pieces of paper). Accordingly, since we are able now to comply precisely with what CDC has requested and what the Court has ordered us to produce and simultaneously to comply with the request made in the demand enclosed with your letter of October 2, we will not willingly make any of the documents called for available at any other time or on any other schedule than that contemplated by the Court's order and by your request.

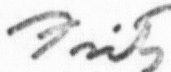
We will promptly advise you of the details regard-

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OCT 16 1970	
ANTI-TRUST	

ing the time and place for production. You may assume that we will commence production on October 19 in Westchester County, New York, with something in excess of one million documents and will continue production of additional documents from day to day until January 15, 1971.

Should you have any questions, please contact me.

Sincerely yours,



Frederick A. O. Schwarz, Jr.

Burton R. Thorman, Esq.,
Assistant Chief, Special Litigation Section,
United States Department of Justice,
Washington, D. C. 20530

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